Sheet Metal Workers International Association, Local #18, AFL–CIO (Globe Sheet Metal Works, Inc.) *and* Paul Mielke. Case 30–CB–3379

September 15, 1994

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS BROWNING AND COHEN

On December 29, 1993, Administrative Law Judge Arline Pacht issued the attached decision. The General Counsel filed exceptions, a supporting brief, and an answering brief, and the Respondent filed cross-exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent with this Decision and Order.

We adopt the judge's finding that the Respondent violated Section 8(b)(1)(A) of the Act by threatening employee Paul Mielke by its letters dated December 15, 1991, and January 3, 1992, with loss of employment because he filed a successful decertification petition. We also agree with the judge that the Respondent further violated Section 8(b)(1)(A) by filing internal union charges against Mielke for working for a nonunion employer in retaliation for his filing of the decertification petition. Contrary to the judge, however, we find that the Respondent also violated Section 8(b)(1)(A) by trying Mielke on the charge and imposing a $3000 fine on him.

The facts are essentially undisputed. The Respondent and Globe Sheet Metal had a longstanding collective-bargaining relationship. Their last agreement, covering a two-man unit, expired on March 31, 1991.[1] A few weeks prior to that date, on March 8, Mielke, a sheet metal worker at Globe and a member of the Respondent, filed a decertification petition with the Board. As the decertification petitioner, Mielke participated in the preelection proceedings and served as an observer at the August 6 election, which the Respondent lost.

Soon after the petition was filed, Michael Engelberger, the Respondent's vice president and business representative, learned that Mielke was the petitioner, and from that point, Engelberger closely followed the progress of the decertification. In mid-November, after the Board officially notified Engelberger that the Respondent was decertified at Globe, Engelberger began an inquiry to determine whether Mielke, who remained a member of the Respondent, continued to work for Globe, a nonunion employer. Under article 17, section 1(g) of the Respondent's constitution a member may be penalized for:

> Accepting employment in any shop or on any job where a strike or lockout, as recognized under this Constitution, exists, or performing any work covered by the claimed jurisdiction of this Association for any employer that is not signatory to or bound by a collective bargaining agreement with an affiliated local union of this International Association, unless authorized by local union.

After attempting and failing to reach Mielke at work on November 18 and 19, Engelberger called Mielke at home on November 19 and asked ''how things were going now that Globe Sheet Metal Work has gone nonunion'' in order to ascertain whether Mielke was still working for Globe. In marked contrast to the Respondent's dealings with other members found to be working for nonunion employers, Engelberger did not tell Mielke that he intended to file internal union charges, or that Mielke had the right to resign, submit a withdrawal card, or seek a referral to a unionized employer. The next day, November 20, Engelberger filed a charge with the Respondent alleging that Mielke had violated the Respondent's constitution.

On the same date, the Respondent notified Mielke that a charge had been filed against him, and advised him that a trial board would convene several weeks later. By letter dated December 10, the Respondent notified Mielke of the date, time, and place of the hearing, and added that if he did not appear, the trial board would proceed with the trial in his absence.

On January 4, 1992, a trial board composed of the Respondent's officers convened to hear Mielke's case. Mielke did not attend. Engelberger, the sole witness, testified by reading aloud a prepared written statement providing a chronological summary of the events. In that statement, Engelberger noted that the Respondent was officially decertified at Globe on October 21, that Mielke paid his dues through October 30, that Mielke wrote to the Union asking about the status of his benefits, and that Mielke worked for a nonsignatory contractor while remaining a member of the Respondent. Following his presentation, Engelberger answered questions from the trial board members.[2] Engelberger gave his statement with supporting documents to the trial board and did not remain while the members deliberated. One of the supporting documents identified Mielke as the decertification petitioner.

[1] Unless otherwise indicated, all dates are in 1991.

[2] One question concerned the timing of the decertification. The other question concerned whether the second employee at Globe, a preapprentice, could also be charged with working for a nonunion employer.

The trial board found that Mielke was in violation of the Respondent's constitution and imposed a $3000 fine. One board member, Marc Dejarlais, testified that there was no discussion of Mielke's participation in the decertification. He acknowledged, however, that he knew of Mielke's role because it was mentioned in one of the documents before the trial board. At the Respondent's general business meeting later that day, the membership voted to affirm the trial board's decision. By letter dated January 13, 1992, the Respondent notified Mielke of the outcome and advised him of his right to appeal the decision.

The judge found that the General Counsel had established a prima facie case that Mielke was both charged and fined for discriminatory reasons, noting that Mielke, in petitioning for decertification, clearly engaged in statutorily protected activity, that Engelberger, the Respondent's agent, was aware of Mielke's role in the decertification, and that Engelberger's inquiry into Mielke's employment status was prompted by the receipt of official notice of the Respondent's decertification at Globe. The judge further found that the Respondent filed the charges against Mielke in retaliation for his protected activities, noting that Engelberger's actions were in marked contrast to the manner in which other union members accused of breaching the same article of the constitution were treated. The judge further found, however, that once the charge was filed, Mielke was treated no differently than other union members accused of violating article 17 and was accorded due process. For the reasons set forth below, we disagree and find that the Respondent's adherence to its standard procedure in trying and fining Mielke is insufficient to rebut the General Counsel's prima facie case that the Respondent acted against Mielke for discriminatory reasons.

In the circumstances of this case, we do not find that the Respondent's trial and fine imposed on Mielke can be analyzed separately from the Respondent's filing of the charge against him. Although there is no evidence that the procedure followed by the trial board in trying and fining Mielke was irregular, the fact remains that Mielke would not have been brought before the trial board and subsequently fined but for the unlawful charge filed against him in retaliation for filing a decertification petition. Having set into motion the unlawful charge, the Respondent is not insulated from the consequences flowing from that charge.[3] Further, to view the trial and fine as severable would leave Mielke subject to a substantial fine and have the effect of penalizing Mielke for having exercised his statutory rights by filing a decertification petition against the Petitioner. *Molders Local 125 (Blackhawk Tanning*), 178 NLRB 208, 209 (1969), enfd. 442 F.2d 92 (7th Cir. 1971). Thus, we find that the Respondent's entire course of conduct, by bringing charges against Mielke, trying him, and fining him, restrained and coerced Mielke in the exercise of his Section 7 rights in violation of Section 8(b)(1)(A) of the Act.

[3] In fact, even if the General Counsel had not alleged the Respondent's trial and fine of Mielke as separate violations of Sec. 8(b)(1)(A), we would have ordered the Respondent, in order to restore the status quo ante, to rescind the fine imposed based on the unlawful charge. See *NLRB v. J. H. Rutter-Rex Mfg. Co.*, 396 U.S. 258, 265 (1969) (Board remedies are ''designed to restore, so far as possible, the status quo that would have been obtained but for the wrongful act'').

REMEDY

Having found that the Respondent has engaged in unfair labor practices in violation of Section 8(b)(1)(A) of the Act, we shall order that it cease and desist and take certain affirmative action designed to effectuate the policies of the Act.

We shall order the Respondent to rescind and refund the full amount of the fine assessed against Paul Mielke, with interest to be computed in the manner set forth in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). We shall further order that the Respondent remove from its records all references to the unlawful proceeding and fine against Mielke, and notify him in writing that this action has been taken and that the charge and fine will not be used against him in any way.[4]

ORDER

The National Labor Relations Board orders that the Respondent, Sheet Metal Workers International Association, Local #18, AFL–CIO, its officers, agents, and representatives, shall

1. Cease and desist from

(a) Charging its members with violating the Union's constitution because they have engaged in protected concerted activity, including their resort to the processes of the National Labor Relations Board in petitioning for decertification of the Union as their collective-bargaining agent.

(b) Trying and fining its members for violating the Union's constitution because they have engaged in protected concerted activity, including their resort to the processes of the National Labor Relations Board in petitioning for decertification of the Union as their collective-bargaining agent.

[4] The judge's recommended Order, at par. 1(c), requires the Respondent to cease and desist from restraining or coercing employees of Globe Sheet Metal Works ''or any employer.'' There is no evidence that the Union's conduct was directed toward employees of any employers other than Globe Sheet Metal Works, so an order which goes beyond this particular employer is not appropriate. See *Communications Workers of America v. NLRB*, 362 U.S. 479 (1960). We shall therefore modify the judge's recommended Order, and the corresponding notice language, to delete the language ''or any employer.''

(c) Restraining or coercing employees of Globe Sheet Metal Works by sending letters or otherwise threatening them with removal from their jobs when they are under no statutory duty to join or remain members of the Union.

(d) In any like or related manner restraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Rescind and refund the fine assessed against Paul Mielke, with interest computed in the manner set forth in the remedy section of this decision.

(b) Remove from its files any reference to the unlawful proceedings and fines against Paul Mielke and notify him in writing that this has been done and that the charge and fine against him will not be used against him in any way.

(c) Advise Paul Mielke and Globe Sheet Metal Works, Inc., in writing, that Respondent, Local 18, is not seeking to remove Mielke from his job and is not seeking to enforce any union-security obligation among employees at Globe Sheet Metal Works.

(d) Post the attached notice marked ''Appendix.''[5] Copies of the notice, on forms provided by the Regional Director for Region 30, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places in its business office, meeting halls, and all places where notices to employees and members customarily are posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(e) Sign and return to the Regional Director sufficient copies of the notice for posting by Globe Sheet Metal Works, Inc., if willing, at all places where notices to employees customarily are posted.

(f) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

APPENDIX

NOTICE TO EMPLOYEES AND MEMBERS
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT charge members with violating the Sheet Metal Workers International Association, Local #18, AFL–CIO constitution because they have engaged in protected concerted activity, including their resort to the processes of the National Labor Relations Board in petitioning for decertification of the Union as their collective-bargaining agent.

WE WILL NOT try and fine members for violating the Union's constitution because they have engaged in protected concerted activity, including their resort to the processes of the National Labor Relations Board in petitioning for decertification of the Union as their collective-bargaining agent.

WE WILL NOT restrain or coerce employees of Globe Sheet Metal Works by sending letters or otherwise threatening them with removal from their jobs when they are under no statutory duty to join or remain members of the Union.

WE WILL NOT in any like or related manner restrain or coerce employees in the exercise of rights guaranteed them by Section 7 of the Act.

WE WILL rescind and refund the fine assessed against Paul Mielke, with interest.

WE WILL remove from our files any reference to the unlawful proceedings and fine against Paul Mielke and WE WILL notify him in writing that this has been done and that the charge and fine will not be used against him in any way.

WE WILL advise Paul Mielke and Globe Sheet Metal Works, Inc. that the Union is not seeking to remove Paul Mielke from his job and is not seeking to enforce any union-security obligation among employees at Globe Sheet Metal Works.

SHEET METAL WORKERS INTERNATIONAL ASSOCIATION, LOCAL #18, AFL–CIO

Benjamin Mandelman, Esq., for the General Counsel.
John J. Brennan, Esq. (Previant, Goldberg, Uelmen & Gratz), of Milwaukee, Wisconsin, for the Respondent.

DECISION

STATEMENT OF THE CASE

ARLINE PACHT, Administrative Law Judge. Upon a charge filed on February 3, 1992, by Paul Mielke, an individual, a complaint issued on July 21, 1992,[1] alleging that the Respondent, Sheet Metal Workers International, Local No. 18, AFL–CIO (the Local or the Union) violated Section 8(b)(1)(A) of the National Labor Relations Act (the Act) by retaliating against Mielke in various ways because he was instrumental in decertifying the Union as the collective-bargaining representative of unit employees at Globe Sheet Metal Works, Inc. (Globe). The Respondent filed a timely answer on August 3.

[5] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

[1] Unless otherwise noted, all dates occurred in 1992.

At the trial held before me on February 4, 1993, in Milwaukee, Wisconsin, the parties were afforded full opportunity to examine and cross-examine witnesses and introduce relevant documents.[2] On the entire record, including my observation of the witnesses' demeanor, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent is now, and has been at all material times, a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. *The Union's Decertification*

Local 18 and Globe Sheet Metal had a longstanding collective-bargaining relationship until their last agreement covering a two-man unit expired on March 31, 1991. A few weeks before that date, on March 8, Mielke, a sheet metal worker at Globe, filed a decertification petition with the Board. This was the first of a number of steps taken which ultimately led to the Union's demise as the Globe employees' collective-bargaining agent.

Michael Engelberger, the Local's vice president and business representative, testified that soon after the decertification petition was filed, he learned that Mielke was the petitioner. Thereafter, Engelberger kept close watch on the progress of the decertification movement.

As the RD petitioner, Mielke participated in the preelection proceedings and also served as the observer at the August 6 election which the Union lost. Engelberger informed the union members about the outcome of the vote at a subsequent meeting of Local 18.

B. *The Union Suspends and Fines Mielke*

Engelberger testified that in mid-November, just after receiving official word from the Board that the Union was decertified at Globe, he sought evidence to determine whether Mielke was working for a nonunion employer. Under the Union's constitution, that offense could subject the member to charges and possible imposition of a substantial fine. After failing to reach Mielke by telephone at work on either November 18 or 19, Engelberger called him at home on the evening of November 19 and asked, ''how things were going now that Globe Sheet Metal Work has gone nonunion.'' (G.C. Exh. 10g.)

Engelberger acknowledged that he did not tell Mielke the true reason for his telephone call. Not only did the union agent fail to warn Mielke that he was about to prefer charges against him, he did not inform him of his right to resign or submit a withdrawal card, nor mention the possibility of a referral to a union shop.

On the day after this phone call, Engelberger filed a charge with the Union alleging that Mielke was in violation of article 17, section 1(g) of the constitution which provides that a member may be penalized for:

> Accepting employment in any shop or on any job where a strike or lockout, as recognized under this Constitution, exists, or performing any work covered by the claimed jurisdiction of this Association for any employer that is not signatory to or bound by a collective bargaining agreement with an affiliated local union of this International Association, unless authorized by the local union. (R. Exh. 1.)

On the same date, the Local notified Mielke of the charge preferred against him, and advised him that a trial board would be appointed several weeks later. By letter of December 10, the Local further notified Mielke of the date, time, and place of the hearing, and added that if he did not appear, the trial board would proceed with the trial in his absence.

By form letter dated December 15, the Local warned Mielke that he would be suspended from membership as of December 30 for failing to pay dues for 2 months. The letter further stated that if he was suspended and failed to seek timely reinstatement, his employment would be in jeopardy.

Mielke received another computerized form letter dated January 3, 1992, notifying him that he was suspended from membership in Local 18. The letter stated in no uncertain terms that if he failed to pay a reinstatement fee of $200 and 3 months' dues within 10 days, the Local would have ''no choice except to seek your discharge from your current employer, as outlined in the current labor agreement.'' (G.C. Exh. 12(a).)

Robert Batzler, Local 18's financial secretary-treasurer, stated that he became aware of Mielke's role in the decertification movement soon after the petition was filed. He also knew that the Union had been decertified prior to the time the December 15 and January 3 dues delinquency notices issued. Batzler, whose name appeared in type as the signator on each of these letters, admitted that he was nominally responsible for the issuance of the dues arrearage notices such as the ones Mielke received. However, he attempted to minimize his role in their issuance by explaining that such notices were computer-generated and mailed out routinely by office secretaries without his seeing or personally signing them. At the same time, he acknowledged that he had reviewed the list of suspended employees and knew that Mielke's name was on it. Notwithstanding this knowledge, Batzler took no steps to intercept the letters which threatened Mielke with job loss based on the erroneous premise that he was bound by a union-security clause in an extant collective-bargaining agreement. Nor did any other agent of the Local ever attempt to advise Mielke that these letters were issued in error. The Local's failure to correct its errors and rescind the inaccurate portions of the December 15 and January 3 letters contrasts with the conduct of a Sheet Metal health and benefit fund administrator who advised Globe that it was entitled to a refund for payments made after the date of decertification.

Mielke apparently was not alarmed by the December 15 and January 3 letters, for he did not contact the Union to inquire about them. In fact, he communicated with the Local only once following the decertification election and then it was to determine whether he was entitled to any benefits. Mielke said that he did not respond to the Union's communications, believing that once the results of the decertification election were confirmed, he was ''out of the union.'' (Tr. 165.)

[2] The General Counsel's and Respondent's exhibits are referred to as G.C. Exh. and R. Exh. respectively, followed by the appropriate exhibit number.

On January 4, 1992, a trial board composed of union officers convened to hear Mielke's case. Although Mielke was advised that he would be tried in absentia if he failed to appear, he chose not to attend. Thus, Engelberger was the sole witness. He testified by reading aloud a prepared written statement which provided a chronological summary of the events precipitating the charge. He began by noting that the Union was officially decertified as the collective-bargaining representative for the employees at Globe Sheet Metal on October 21, 1991. He then reported that Mielke had paid his dues through October 30; that on November 15, he wrote to the Union to ask about the status of any benefits he might have, and that he worked for a nonsignatory contractor since October 21 while remaining a member of Local 18. Relying on these findings, Engelberger concluded that Mielke was in violation of article 17, section 1(g).

Following this presentation, Engelberger answered several questions posed by the trial board members. One inquiry concerned the timing of the decertification; the other with whether the second employee at Globe, a preapprentice, also could be charged with working for a nonunion firm. Engelberger turned over his statement and supporting documents to the trial board, but did not remain while its members deliberated. One of these documents identified Mielke as the proponent of the decertification petition.

The trial board ruled that Mielke was in violation of the union constitution and imposed a fine of $3000. One of the board members, Marc Dejarlais, testified that there was no discussion of Mielke's involvement in the decertification effort, although he admitted knowing of Mielke's role in that regard because it was mentioned in one of the exhibits presented to the Board. At the Union's general business meeting later that day, the membership voted to affirm the trial board's decision. By letter dated January 13, the Local notified Mielke of the outcome of the trial and advised him of his right to appeal the decision.

CONCLUSIONS OF LAW

A. *The Issues Presented*

As framed by the complaint and answer, the following issues are presented for resolution.

(1) Whether the Respondent violated Section 8(b)(1)(A) of the Act by threatening Mielke in its letters of December 15, 1991 and January 3, 1992, with a loss of employment because he filed a successful decertification petition.

(2) Whether Respondent violated Section 8(b)(1)(A) of the Act by filing charges against Mielke for working for a nonunion employer.

(3) Whether Respondent further violated Section 8(b)(1)(A) of the Act by trying Mielke on the charge; subsequently finding him guilty and imposing a $3000 fine, because he filed a successful decertification petition.

B. *Respondent Unlawfully Threatened Job Loss*

The first issue to be resolved in this case is whether the Union's letters of December 15 and January 3 unlawfully threatened Mielke with a loss of employment for failure to pay dues in violation of Section 8(b)(1)(A) of the Act.[3]

As described above, the Union's December 15 letter warned Mielke of imminent suspension from membership for failure to pay dues and the possible loss of employment. The threat of job loss was repeated more ominously on January 3 when the Union advised Mielke that he was suspended and unless he paid a reinstatement fee and dues forthwith, the Union would seek his discharge. Since Mielke had not resigned from union membership, the Local was within its rights to suspend him. However, following decertification, and with no collective-bargaining agreement in place, the Union had no legitimate basis for threatening him with job loss.

The Union claims that the letters were mailed automatically and without unlawful intent. I do not find this claim persuasive. Baltzer, the union agent ultimately responsible for sending such letters, admitted knowing that Mielke was responsible for filing the decertification petition; months before the Union was decertified, that Mielke worked for a nonunion company and was facing a hearing because of it. He also had to know that in the absence of a contract and valid union-security clause with Globe, the Local had no legitimate basis for threatening Mielke with job loss. Finally, Baltzer knew that Mielke's name appeared on a list of suspended members, and that unless he intervened, the January 3 letter would be mailed to him. Yet, Baltzer did nothing to intercept either letter.

Baltzer implied that such letters issued so automatically that it was virtually impossible to staunch their flow Yet, he also indicated that several office secretaries actually handled this correspondence. Surely, he could have alerted the office personnel to flag Mielke's name and make sure he did not receive the same form letters legitimately sent to other members who owed dues. The process was not as inexorable as Baltzer claimed since a second letter such as the one sent to Mielke on January 3 would not have issued had he resigned. Moreover, if a trust fund administrator was alert enough to note that following decertification, Globe Sheet Metal was due a refund and intervene in the process so that the contributions from the employer were not wrongfully retained, the Local also could have prevented the release of letters which unjustly threatened Mielke with loss of employment. Mielke's name was not unknown to Baltzer—he was well aware of Mielke's role as the decertification petitioner. In these circumstances, the Union cannot disclaim responsibility for Baltzer's failure to halt the issuance of these coercive letters.

The Respondent also contends that Mielke knew that the threat of job loss was meaningless since it was based on the inaccurate assumption that a valid union-security clause was in place. Indeed, Respondent submits that because the warning of job loss was based on such a patently mistaken

[3] Sec. 8(b)(1)(A) states:

> It shall be an unfair labor practice for a labor organization or its agents—
>
> (1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7: *Provided*, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein; . . . .

Of course, if Mielke had not petitioned for decertification, in all likelihood, he still would be working for a union contractor and would not have been charged. However, this does not prove that he was charged and fined because he filed the petition.

premise, the letter obviously was issued inadvertently and could not have been coercive. A similar argument was raised by another union in *Graphic Communications Local 458 (Noral Color)*, 300 NLRB 7, 16–17, (1990). There, the administrative law judge found the Act was not violated by a union's demand to an employer for the discharge of employee-members under a union-shop clause of an expired collective-bargaining agreement where the union promptly rescinded its request and the employees were not coerced by the obvious error, The Board reversed the administrative law judge on the following grounds:

> We do not find it would be reasonably obvious to the employees in question that the form letters requesting their discharges were simply inadvertent mistakes. A reasonable reading of these letters through the eyes of the targeted employees would reveal that the facts recited in each letter concerning each employee's expulsion from the Union because of his failure to pay dues were accurate and that the Respondent's request for their discharges was entirely consistent with its previous unlawful efforts to prevent them from resigning. The erroneous reference in the letters to ''our current labor agreement,'' while . . . mitigating the potential coercive effect of these letters on the Employer, had no such mitigating effect on the targeted employees themselves.

Id. at 11. At no time did Local 18 make any effort to rescind those portions of the December 15 and January 3 letters which warned Mielke of possible discharge, nor did anyone assure him that those aspects of the letters were issued in error. Although, in the absence of a collective-bargaining agreement, the Union had no power to carry out its threat, the above-cited cases compel the conclusion that the threat of job loss was no less coercive here than in *Noral Color*.

The Union also cites *Longshoremen ILA Local 333 (Ito Corp.)*, 267 NLRB 1320 (1983), to support its contention that under the circumstances, the warnings in the letters to Mielke were not threatening. In *Longshoremen ILA*, a union agent, upset that a member had filed an unfair labor practice charge against the union, told the member's supervisor to warn him he would not be working the next day and should go to the Board if he wanted a job. These remarks were not communicated to the member until the following day when he was already working. Consequently, the Board said: ''[I]t cannot reasonably be concluded under these circumstances, which rendered . . . [the member's] statement nugatory, that it tended to coerce or intimidate Moore in the rights guaranteed him by the Act.'' Clearly, Respondent's reliance on this case is misplaced for here, the Local's threat that it would seek Mielke's discharge was not limited to a date which had passed by the time he received the letters. Hence, it cannot be said here that the Union's threat was nugatory, as was the case in *Longshoremen ILA*. Id. at 1321.

The Respondent also points out that the unfair labor practice charge Mielke filed with the Board focused solely on the $3000 fine and did not allude to the threats of job loss. I am not convinced that this omission proves that Mielke was wholly unconcerned about those threats. Since the conduct alleged to be unlawful was typewritten on a form in typical Board ''legalese,'' it is fair to assume that it was prepared by a Board agent. Mielke should not be held accountable for what a Board representative chose to include or omit from the charge. Accordingly, I conclude that the Union's threats to seek Mielke's discharge reasonably tended to coerce or intimidate him in the exercise of rights protected under the Act, thereby violating Section 8(b)(1)(A) of the Act.

B. *Mielke was Charged Because He Petitioned for Decertification*

1. Applicable principles

Under the proviso to Section 8(b)(1)(A), which states that a labor organization may prescribe its own rules with respect to the acquisition or retention of membership, a union may expel, fine, or otherwise discipline members without engaging in unlawful restraint or coercion. However, a union may not impose a fine if it infringes on the individual's exercise of statutory rights. For example, a union may not fine a member for filing a decertification petition since ''the effect is not defensive and can only be punitive to discourage members from seeking access to the Board's processes.'' *Molders Local 125 (Blackhawk Tanning)*, 178 NLRB 208, 209 (1969), enfd. 442 F.2d 92 (7th Cir. 1971).

The General Counsel contends that the Union unlawfully charged, tried, and fined Mielke because he filed a successful decertification petition. The Union counters that it treated Mielke no differently than other members who, like him, were sanctioned for failing to adhere to the constitutional proscription against working for a nonsignatory contractor. Where, as here, the evidence suggests that the Respondent may have had both lawful and unlawful motives for charging and fining Mielke, the Board applies a two-step mode of analysis in determining causation. *Plasterers Local 121*, 264 NLRB 192 (1982). First, the General Counsel bears the burden of establishing a prima facie case that the Respondent acted against Mielke for discriminatory reasons. Thereafter, the burden shifts to the Respondent to show that even if Mielke had not petitioner for decertification, it still would have charged and fined him.

2. The General Counsel's prima facie case

There is no question that the General Counsel adduced sufficient evidence to establish a prima facie case that Mielke was charged and fined for discriminatory reasons. In petitioning for decertification, Mielke clearly engaged in statutorily protected activity. Of course, Engelberger, the union agent responsible for bringing the charges against Mielke, was keenly aware of his role as the decertification petitioner. Indeed, it appears that Engelberger's inquiry into Mielke's employment status was prompted by his receiving official notice of the Union's decertification at Globe.

The decertification effort was no secret; it was discussed at union meetings and at the monthly business agent meetings. Further, Baltzer candidly acknowledged that decertifications were rare and unwelcome events in the Local's experience and, therefore, certain to come to the attention of virtually anyone concerned with the Union's administration.

The somewhat stealthy manner in which Engelberger gathered evidence against Mielke in order to justify filing the charge, suggests that the business agent was less interested in upholding the Union's constitution than in retaliating

against the individual responsible for decertifying the Local. Engelberger readily admitted during the hearing that without revealing his real motive, he telephoned Mielke for only one reason—to confirm that he still worked for a company that no longer had a union contract as a basis for charging him with violating the Union's constitution. Satisfied that he had obtained the requisite proof, Engelberger filed a charge the very next day.

Engelberger's failure to disclose his intentions to Mielke and his haste in filing the charge against him is in marked contrast to the manner in which other union members were treated who were accused of breaching the same article of the constitution. Documents introduced into evidence show that when business agents discovered that a member had opened his own shop or was working for a nonunion company, they invariably attempted either to persuade the errant member to sign a collective-bargaining agreement or transfer to a different company. Only after such efforts failed, did the agent file charges. See, for example, the papers comprising Respondent's Exhibit 3 which establish that a Local 18 business agent made repeated efforts over several months time to induce union member Dennis Bradley to sign a labor agreement. Another business agent extended similar consideration to Gregory Johnson who was not charged with violating the constitution until more than a month had elapsed after he was advised that he might be subject to charges for working for a nonunion employer.

Other documents in evidence show that union members Alan Bryl, Ronald Clark, Clarence Eckholm, and Walter Henderson, to name a few, were charged after they had become independent contractors and offered multiple opportunities to sign labor agreements with the Local. The record further discloses that Thomas Goodman was not charged until he rejected the Local's offer to transfer him from a nonunion to a union company. At no time did any union agent offer Mielke an opportunity to avoid the union charge. In fact, no only did Engelberger conceal his intentions, he hastened to cite him a day after verifying that Mielke was working for a nonsignatory business.

Engelberger's disparate treatment of Mielke gives rises to the inference that he charged him with violating the Union's constitution for a vindictive purpose. He was bent on triggering a process that he believed would penalize the person who had ousted the Union at Globe. The foregoing considerations support the conclusion that the Respondent charged Mielke with violating its constitution to retaliate against him for engaging in activity protected by Section 7 of the Act.

3. Respondent lawfully tried and fined Mielke

The Respondent claims that it would have charged, tried, and fined Mielke even in the absence of his antiunion activity. To support this contention, Respondent relies on the same documents the General Counsel cites in taking a contrary position. As found above, it is unlikely that Engelberger would have had occasion to file a charge against Mielke had he been as forthcoming with him as his fellow business agents were with other errant union members, or if he had acted less hastily in filing the charge. However, once the charge was filed, the record establishes that Mielke was treated no differently than other union members who were accused of violating article 17.

An examination of the Respondent's exhibits show that the Union handled the trials of all members charged with violating article 17 in a manner which closely matched the way in which it proceeded against Mielke. Thus, in all but one of the documented cases, the trials were scheduled to take place within a month after the charge was filed. Similarly, Mielke was notified of the date, time, and place of his trial approximately a month before it was held. Mielke's failure to contract the Union on receiving the various notices sent to him is one of the mysteries of this case. Certainly, if he was capable of filing a decertification petition and an unfair labor practice charge, and if he could telephone the Union to inquire about the status of his benefits, he also was capable of determining that the Union could legitimately demand that he submit a formal resignation.

The record further establishes that the Union was not intent on conducting star chamber proceedings. Although the Local furnished each accused member with adequate notice, in most instances, they failed to appear and were tried in absentia. This was the course that Mielke also chose. At each trial, the charging union official read a prepared statement which set forth the Union's proof supporting the violation and then, was excused while the trial board deliberated. This was the procedure followed in Mielke's case.

In virtually all cases, the trial board found the accused member guilty of the violations alleged and assessed fines which were comparable to the sum levied against Mielke. It is true that no other member was fined more than $3000 for violating article 17, section 1(g). However, a number of members were charged with and found guilty of violating two or three sections of article 17, based on the same conduct, and were fined amounts totaling as much as $10,000. Consider the case of union member Perry Villani. (R. Exh. 16.) Villani was notified on January 11, 1989, of his trial to be held almost a month later on February 4. Like Mielke, he was tried in absentia for violating Section 1(g) for starting his own nonunion business and employing two other union members. For this Villani was fined $2500. In addition, Villani was charged with violating article 17, section 1(m) for ''Engaging in . . . any conduct which is detrimental to the best interests of this Association or any subordinate unit thereof or which will bring said unions into disrepute.'' Multiple fines for the same offense arising under various sections of article 17 also were assessed against other members of Local 18 including Phillip Windler, Gregory Johnson, Walter Henderson, and Alan Bryl. By contrast, Mielke received lighthanded treatment since he was charged with and fined for violating only one section of the article.

As found above, the manner in which Engelberger sought evidence to prove Mielke's wrongdoing and his haste in filing the charge, prove that Respondent acted with a retaliatory motive. However, a review of Respondent's exhibits compels a different conclusion with respect to his subsequent trial and fine. These records establish that after the charge issued, Mielke was treated no differently than any other union member accused of violating article 17 of the Union's constitution and was accorded full due process. At the outset, it is important to note that the charge itself advised Mielke that he had violated the constitution by ''performing . . . work . . . for any employer that is not signatory or bound by a collective bargaining agreement with an affiliated local'' after October 21 and while he remained a member of the Local. (G.C. Exh.

10(c).) If Mielke had any doubt about the status of his union membership, he only had to contact the Union to put the matter to rest. Having chosen not to do that, he may not be heard to complain now that he was treated unfairly.

Moreover, notwithstanding the bias which prompted Engelberger to press forward with the charge, the report which he read to the trial board did not allude to Mielke's role as the decertification petitioner. Further, Dejarlis testified without controversion, that the trial board did not discuss or consider Mielke's role in the decertification effort. General Counsel faults Respondent for adducing testimony about Mielke's trial from only one member of the board. However, the Union had no duty to produce all the members of this body. If the General Counsel wanted to disclose contradictions in their accounts, it was his burden to produce the other members.

Accordingly, I conclude that the Respondent has proven that it would have sanctioned Mielke even if he had not engaged in protected, concerted activity. It follows that the Respondent did not violate Section 8(b)(1)(A) in bringing Mielke to trial and imposing a fine when he continued to work for a nonsignatory contractor firm while remaining a member of the Union.

CONCLUSIONS OF LAW

1. Respondent is a labor organization within the meaning of Section 2(5) of the Act.

2. Respondent violated Section 8(b)(1)(A) of the Act by threatening Paul Mielke with a loss of employment for failure to pay dues in its letters of December 15, 1991, and January 3, 1992, and by charging him with a violation of its constitution, because he filed a successful decertification petition.

3. The above-described unfair labor practice affects commerce within the meaning of Section 2(6) and (7) of the Act.

4. Respondent did not violate the Act by trying and fining Mielke for working for a nonunion employer while he remained a member of Local 18.

THE REMEDY

In order to effectuate the policies of the Act, the Respondent shall be ordered to cease issuing letters to employees of Globe Sheet Metal or to other employees which threaten them with a loss of employment when there is no duty to join or remain members of the Union and advise Paul Mielke that it is not seeking to remove him from his job. Further, Respondent shall be directed to cease charging its members for attempting to use the processes of the National Labor Relations Board in having the Union decertified as their bargaining representative. Lastly, Respondent shall be ordered to post the notice to members appended to this decision.

[Recommended Order omitted from publication.]